(17)

No. 97-843

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

AURELIA DAVIS,
AS NEXT FRIEND OF LASHONDA D.,
Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER AURELIA DAVIS

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QUESTION PRESENTED FOR REVIEW

I. Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in federally funded education programs and activities, encompasses a cause of action for peer hostile environment sexual harassment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statues, Regulations and Rules

Other Sources

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is a non-profit organization established in 1982 and based in Charlottesville, Virginia, providing legal services nationwide in defense of civil and religious liberties. Attorneys affiliated with the Institute have appeared numerous times before this Court on such matters, most recently as counsel of record for Respondent in *Arkansas Educational Television v. Forbes*, Sup.Ct. No. 96-779 (October Term, 1996).

II. SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972, codified at 20 U.S.C. § 1681, provides in pertinent part that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." For purposes of this title, "educational institution" is defined to include "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . ." 20 U.S.C. § 1681(c).

This Court on two occasions has unequivocally found that the proscriptions against sex discrimination in education established in Title IX provide a private right of action against sexual harassment perpetrated by a faculty member. *See*

[1] The parties have consented to the filing of this brief. Counsel for the Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. __, Sup.Ct. No. 96-1866 (June 22, 1998).

The Court is now called upon to determine whether Title IX, properly construed, provides a student with the same federal legal protections against peer sexual harassment discrimination in her place of learning as it affords to an employee in her place of work.[2] *Amicus curiae* The Rutherford Institute respectfully suggests that Title IX does under the circumstances presented to the Court -- where the plaintiff has made a *prima facie* demonstration that school authorities knowingly disregarded a student's subjection to pervasive sexual conduct that "unreasonably interfer[ed] with [her] work or performance or creat[ed] an intimidating, hostile, or offensive [educational] environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

III. ARGUMENT

A. A CONSTRUCTION OF TITLE IX TO PROHIBIT ALL FORMS OF SEXUAL HARASSMENT IN EDUCATION IS MOST CONSISTENT WITH THIS COURT'S

[2] *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1186, 1412 (11th Cir. 1997), *en banc*, (Barkett, Cir. Judge, dissenting, citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. at 74-75). "Title VII, and thus Title IX, 'strike at the entire spectrum of disparate treatment of men and women,' including conduct having the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive environment." *Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525, 540 (1st Cir. 1995), quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986). *Accord Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899 (1st Cir. 1988).

HOSTILE ENVIRONMENT JURISPRUDENCE UNDER BOTH TITLE IX AND TITLE VII.

The *en banc* Eleventh Circuit's strict construction of the scope of Title IX's prohibition on sexual harassment discrimination in education is at odds with the Supreme Court's well-developed racial and sexual harassment jurisprudence under both Title IX and Title VII of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000e-2(a)(1). In holding that Title IX provides an implied private right of redress for gender discrimination in federally-funded education programs, the Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), relied heavily on its conclusion that Congress patterned Title IX after Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "race, color, or national origin" in language and provisions substantially identical to those of Title IX. *Id.* at 695-96; *accord Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514 (1982). Since Title VI had already been construed to provide an implied private right of action when Title IX was adopted in 1972, it seemed evident to the Court that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been [to include a private cause of action] . . . ." *Cannon,* 44 U.S. at 696. In so determining, the Court expressly rejected the "strict construction of the remedial aspect of [Title IX]" applied by the court of appeals in holding no implied private remedy existed. *Id.* at 698.

The Court continued its broad and amelioratory reading of Title IX in *North Haven Bd. of Educ. v. Bell, supra,* and *Grove City College, supra.* Ruling contrary to the opinions of a majority of the circuit courts of appeal which had considered

the issue,[3] *North Haven* upheld the former Department of Health, Education and Welfare's "Subpart E" Title IX regulations, which had extended the proscription on discrimination to employment practices. 456 U.S. at 516, citing 34 C.F.R. 106.51-106.61(1980). The *North Haven* Court reiterated, "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" 456 U.S. at 521, quoting *United States v. Price*, 383 U.S. 787, 801 (1966). Similarly, the *Grove City* Court declined to hold § 901(a) of the Act inapplicable to institutions that received federal funds only indirectly through student educational grants. The Court agreed that the Act "appears to encompass all forms of federal aid to education, direct or indirect,"[4] and so held in keeping with *North Haven*'s mandate to accord the Act a broad interpretation. 465 U.S. at 564.

Sexual harassment claims under Title IX developed along similar lines as an expression of the Court's expansive interpretation to accomplish all the Act's objectives. In *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), the Court unanimously concurred in holding, first, that the private right of action recognized in *Cannon* entitles a prevailing plaintiff to a damages remedy; and second, that the right of action permits redress of a hostile educational environment created by a teacher. 503 U.S. at 75. In reaching

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[3] The First, Sixth, Eighth and Ninth Circuits had held that Title IX coverage did not extend to discrimination in employment, while the Second and Fifth had held that it did. *See generally*, cases cited in J. Cook and J. Sobieski, Jr., Civil Rights Actions, Vol. 4, § 17.20, at 17-31, nn.2,3.

[4] *Id.* at 564, quoting *Grove City College v. Harris*, 687 F.2d 684, 691 (3rd Cir. 1982).

this conclusion, the Court harkened back to *Meritor*:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s] on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Id., quoting *Meritor*, 477 U.S. at 64 [citation in text omitted]. The Court so held because it viewed sexual harassment as one of the "intentional actions [Congress] sought by statute to proscribe." *Id.*

The Court continued to construe the statute broadly in the most recent term in *Gebser v. Lago Vista Independent Sch. Dist.*, although it found that the notice requirement imposed by spending clause precedent precluded the application of agency principles of liability based upon *respondeat superior* or constructive notice. Slip op. at 9. In so holding, the Court was concerned only with limiting the scope of school board liability in cases where they have no knowledge of the alleged harassment (which is not the factual predicate before the Court), and not with revisiting its view that Title IX was intended to prohibit all forms of intentional sex discrimination.

In contrast with this Court's approach to determining the scope of Title IX liability is the *en banc* Eleventh Circuit's opinion. Noting that the Supreme Court "has not squarely addressed the issue of student-student sexual harassment," *Davis*, 120 F.3d at 1395, the appeals court went on to inordinately circumscribe the intent of *Franklin*. The court's syllogism is revealing: First, the court observed that "[i]n

general, the [Supreme] Court has allowed private plaintiffs to proceed under Title IX only in cases that allege institutional gender discrimination by the administrators of educational institutions." *Id.* Of course, this Court has not so held, since it has not yet spoken to sexual harassment discrimination perpetrated by peers but acquiesced in by administrators. Second, the Eleventh Circuit opinion observes that neither the Supreme Court nor the Eleventh Circuit has held a school board liable for its failure to prevent non-employees from discriminating against students on the basis of sex, an observation that, while accurate, did not materially advance the issue before the court. *Id.* Finally, the court determined to "examine the legislative history of Title IX to determine whether Congress intended this provision to reach appellant's allegations." *Id.* *Amicus* respectfully suggests that this decision to look to legislative history, rather than the already developed federal law of racial and sexual harassment, led the court down a blind alley to a conclusion that is in conflict with nearly two decades of federal sexual harassment jurisprudence.

The *en banc* Eleventh Circuit majority opinion is rather disingenuous in stressing that in passing Title IX, the Congress did not consider student on student sexual harassment. *Davis*, 120 F.3d at 1396-97. The Congressional debate did not consider the issue of sexual harassment in educational programs at all, for the federal law of sexual harassment under Title VII was not to develop until after both the passage of Title IX in 1972 and the *Cannon* decision in 1979 affording a private right of action for victims of prohibited sex discrimination under Title IX. *See generally* B. Lindemann & D. Kadue, Sexual Harassment in Employment Law (1992), at 30 ("In 1980, no court had yet held that a sexually hostile environment, involving no tangible job detriment, was actionable.") Nonetheless, the development of federal sexual harassment

law, like that of racial harassment law before it, reflects a clear intent to include all forms of hostile environment harassment, including peer harassment.

In the Eleventh Circuit's seminal sexual harassment decision in *Henson v. City of Dundee*, 682 F.2d 897 (1982), the court found that allegations of supervisor harassment of a police dispatcher were sufficient for a *prima facie* showing of discrimination under Title VII without proof that the employee suffered tangible job detriment. 682 F.2d at 901.[5] Although *Henson* was a case of supervisor harassment, the court made no distinction on that basis. The court drew from the well-developed body of case law that co-workers can create a racially hostile work environment,[6] principally *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), to determine that:

> [s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

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[5] Title VII renders it unlawful for any public or private employer with more than fifteen employees to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. §§ 2000e-2(a)(1).

[6] "Employer liability for unchecked racial harassment by co-workers was well-established by 1980, when the First Circuit decided *DeGrace v. Rumsfeld* [614 F.2d 796 (1st Cir. 1980)]." Lindemann and Kadue, *supra*, at 236-37.

Henson, 682 F.2d at 902. When "seek[ing] to hold the employer responsible for the hostile environment created by the plaintiff's supervisor ***or co-worker***," the court stated, a Title VII claimant must show the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Id.* at 905 [emphasis added].

The court referenced numerous cases involving allegations of co-worker racial harassment. *Id.*, at n.4. The court also stated that it was also "bolstered in [its] conclusion" by the D.C. Circuit Court's decision in *Bundy v. Jackson*, 641 F.2d 934 (D.C.Cir. 1981), which had held the year earlier that the equation of sex discrimination with a hostile work environment caused by sexual harassment "follows ineluctably from numerous cases finding Title VII violations where an employer *created or condoned* a substantially [racially] discriminatory environment . . . ." *Henson*, 682 F.2d at 902, quoting *Bundy v. Jackson*, 641 F.2d at 943-44 [emphasis added]. Hence, it is apparent that both the law of racial harassment and the then-nascent law of sexual harassment contemplated the creation of a hostile work environment by an employer who knows of an abusive environment inflicted by a claimant's co-workers but fails to take corrective action.

By 1986, the Supreme Court was able to unanimously concur in *Meritor v. Vinson*, that a right of action existed for sexual harassment as a form of sex discrimination under Title VII. The Court did so by first observing that sexual harassment was a type of gender-based discrimination: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." 477 U.S. at 64. The Supreme Court next rejected the argument that in passing the 1964 Civil Rights Act, Congress was concerned only with "tangible losses of an

economic character" and not "purely psychological aspects of the workplace environment." *Id.* The Court stated that "[t]he phrase, 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[7] The Court concluded by quoting the now-familiar language of *Henson v. Dundee* denouncing the "requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living" created by a hostile work environment.[8] *Meritor,* like *Henson,* expressly approved the incorporation of the line of authority relating to racial harassment in a co-worker setting. *Meritor,* 477 U.S. at 65-66.

The Court in *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993), affirmed that compensation for subjective emotional distress is recoverable under Title VII in the context of hostile work environment claims by recognizing that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at 22. The Court once again cited *Rogers v. EEOC* with approval. *Id.*

The Supreme Court's recent companion opinions in *Burlington Industries, Inc. v. Ellerth*, __ U.S. __ (Sup.Ct. No. 97-569, June 26, 1998) and *Faragher v. City of Boca Raton*,

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[7] *Id.*, quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978)[cites omitted in text].

[8] *Meritor,* at 67, quoting *Henson v. Dundee, supra,* 682 F.2d at 902.

__ U.S. __ (Sup.Ct. No. 97-282, June 26, 1998), and its decision in *Oncale v. Sundowner*, __ U.S. __, Sup.Ct. No. 96-568 (March 4, 1998) furthered the broad scope of hostile environment liability. Notably, *Oncale* held that Title VII's prohibition on discrimination "because of sex" "must extend to sexual harassment of any kind that meets the statutory requirements [of altering "terms and conditions" of employment]." Slip op. at 4.

Although early Title VII decisions sometimes held that co-workers cannot create a hostile work environment because they lack the authority to alter the terms and conditions of a complainant's employment,[9] it is now established beyond dispute that a hostile work environment cause of action exists for severe or pervasive co-worker harassment. *E.g., Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Baker v. Weyerhauser Co.*, 903 F.2d 1342 (10th Cir. 1990); *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900 (11th Cir. 1988); Lindemann and Kadue, *supra*, at 237. Several of the circuit courts adopted this co-worker rule even prior to *Meritor.* The Equal Employment Opportunity Commission Guidelines on Sexual Harassment address co-worker harassment as follows:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

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[9] *See* Lindemann and Kadue, *supra,* at 236.

29 C.F.R. § 1604.11(d). *Accord Burlington Industries, Inc. v. Ellerth, supra; Faragher v. Boca Raton, supra.*

The Eleventh Circuit was also misguided in relying on its perception that the agency principles of Title VII have no relevance to the issue before it. 120 F.3d at 1400, n.13.[10] "Courts now recognize that the formal authoritiy of the harasser does not control whether the harassment had made the complainant's environment so hostile, offensive, or intimidating as to alter the terms and conditions of work." Lindemann and Kadue, *supra* at 236. In employment cases, this rule is sometimes expressed to establish liability where a supervisor's failure to respond rises to the level of ratification, making peer harassment tantamount to harassment by those in authority.[11] "The capacity of any person to create a hostile or offensive work environment is not necessarily enhanced or diminished by any degree of authority which the employer confers on the individual." *Henson v. City of Dundee,* 682 F.2d at 910.

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[10] The Court in *Meritor* declined to adopt a rule that would render employers automatically liable for sexual harassment by their supervisors in a hostile work environment cause of action, instead directing lower courts to consult agency principles for guidance on the issue of employer liability. *Meritor,* 477 U.S. at 65. The *Meritor* Court recommended that the lower courts refer to §§ 219-237 of the Restatement of Agency. These sections are found in Chapter Seven, Topic Two, Title B of the Restatement entitled, "Liability of Principal to Third Persons - Liability for Authorized Conduct or Conduct Incidental Thereto - Torts of Servants." Restatement (Second) of Agency §§ 219-237 (1958).

[11] *See, e.g., Katz v. Dole,* 709 F.2d 251, 255 n.6 (4th Cir. 1983) ("Where, as here, the employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy."); *see generally* Lindemann and Kadue, at 234.

In keeping with this rule, an employer may be liable for a hostile work environment under Title VII despite that the environment was not created by its employees or agents.[12] In such cases, "[w]here employers can control the conduct of nonemployees, the analysis strongly resembles that used in determining employer liability for co-worker harassment." Lindemann and Kadue, at 250-51. *See, e.g., Waltman v. International Paper Co.,* 875 F.2d 468 (5th Cir. 1989); *Trent v. Valley Electric Ass'n,* 41 F.3d 524 (9th Cir. 1994). *See generally,* Lindemann and Kadue, *supra* 1997 Supp. at 73-76.

In this regard, the *en banc* Eleventh Circuit's talismanic fixation on the lack of an agency relationship between school officials and students and the fact that students do not act on the school's authority is directly counter to the historical development and current state of federal anti-discrimination law.

Since *Franklin*, then, this Court has unanimously concurred in the view that some form of liability exists in Title IX cases, but has not demarcated in either its Title VII or its Title IX analyses between a hostile environment created by a person in authority - such as an administrator or faculty member - and one created by the intentional acquiescence of those in authority with peer sexual harassment. In light of the cohesive development of Title VII sexual harassment law without regard to the source of a hostile environment, no principled distinction may be drawn between a supervisor-

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[12] *See generally,* Lindemann and Kadue, *supra* Chapter 8, at 246 *et seq.*, "Harassment by Nonemployees". The EEOC guidelines provide for employer liability for nonemployee conduct "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e). However, the extent of the employer's control over the conduct, among other factors, in considered. *Id.*

created hostile environment and a peer-created hostile environment in federal sexual harassment law. For the Court now to draw such a distinction would redirect the course of federal sexual harassment jurisprudence into uncharted waters, where no guiding principles would be available to enable school administrators to distinguish between an atmosphere of sexual intimidation inflicted upon a student by an administrator or faculty member, for which liability will be imposed, see *Franklin, Gebser,* and an equally intimidating atmosphere created or facilitated by the complicity of the same adults in the hostile sexual conduct of fellow students. Title IX was clearly phrased to strike at all discrimination perceived from the point of view of victims of harassment, having been written in the subject-neutral voice to mandate that "[n]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . " 20 U.S.C. Sec. 1681. To now read into the Act an intention to restrict liability to instances where school authorities themselves create the discriminatory environment is to unduly restrict its application to the point of frustrating its purpose.

B. A RULE OF REASON IN THE INSTANT CASE SUGGESTS A CAUTIOUS APPLICATION OF TITLE VII SEXUAL HARASSMENT STANDARDS IN A PRIMARY SCHOOL SETTING.

While the *en banc* Eleventh Circuit repeatedly expressed reservations about the efficacy of importing Title VII hostile work environment principles into the educational setting, the facts of the case before the Court perfectly satisfy the requirements for vicarious liability under Title IX set forth in this Court's recent opinion in *Gebser v. Lago Vista*

Independent Sch. Dist., supra. The *Gebser* majority opinion explained that a damages remedy against a recipient of Title IX funds is appropriate where "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.*, Slip op. at 15. Unlike the plaintiff in *Gebser*, who informed no school officials about the sexual harassment she suffered, the petitioner in this case alleges ample facts to satisfy this "deliberate indifference" standard.

Thus, the Monroe County school officials had actual notice that a student in their school was "on the basis of sex, be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under [an] education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The officials chose to take no action, thereby ratifying G.F.'s harassing conduct. As the First Circuit observed in *DeGrace v. Rumsfeld*, in the context of racial harassment, "more than mere verbal chastisements of those . . . who [use] racial epithets was needed in order . . . forcefully to convey the message that racism would not be tolerated." 614 F.2d at 805. To paraphrase that court, while a school official "cannot change the personal beliefs of his [students] he can let it be known . . . that [sexual] harassment will not be tolerated, and he can take all reasonable measures to enforce this policy." *Id.* at 805. Just as in *Franklin v. Gwinnett County, supra*, the plaintiff in this case is entitled to monetary damages under an implied private right of action for the school administrator's lack of corrective action.

Judge Tjoflat separately expressed his view in the *en banc* Eleventh Circuit opinion that "[p]hysical separation of the

alleged harasser from other students is the only way school boards can ensure that they cannot be held liable for future acts of harassment," *Davis,* 120 F.3d at 1402. Such a drastic response, Judge Tjoflat reasoned, would put schools in an impossible dilemma every time they received an allegation of student-on-student harassment. However, this alarm is unnecessary.

In Title VII caselaw, suspension of the harasser is not the only, or even the preferred response to allegations of sexual harassment. Employers have been absolved from liability where they took prompt remedial action reasonably calculated to deter future harassment. *See, e.g., Steele v. Offshore Shipbldg.*, 867 F.2d 1311 (11th Cir. 1989)(employer not liable where, after prompt reprimand, harassment stopped); *Swentek v. USAir*, 830 F.2d 552 (4th Cir. 1987)(written warning was adequate remedial action by employer). Some alternative remedies to firing include temporary transfer pending the outcome of the investigation; offering counselling to the harasser and victim; oral and written warnings; suspensions and demotions; and transfers, reassignments, and restructuring of the environment. *See generally* Lindemann and Kadue, *supra* Chap. 19 (1992 Volume and 1997 Supp.) and cases cited therein.

III. CONCLUSION

The Court's a*micus* respectfully suggests that the best means of ensuring that employers and employees will take seriously the proscriptions against discriminatory workplace conditions and respect the dignity of their co-workers is to have those proscriptions instilled into them as part of the educational process. If teachers and school administrators knowingly fail to protect students in their care from sexual harassment which

officials have the power to stop, they invite liability under their Title IX contractual obligations. Perhaps more importantly, they condition students at a young age to accept sexual harassment as inevitable, and to view reporting harassment as futile.

For the reasons set forth above, *amicus curiae* The Rutherford Insititute respectfully suggests that the judgment of the *en banc* Eleventh Circuit Court of Appeals be reversed and the case remanded to permit Petitioner to proceed on her Title IX claim.

Respectfully submitted,

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